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No.: _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

ANGELO RUGGIERO, GENE GOTTI, JOHN CARNEGLIA, EDWARD LINO, MARK REITER, JOSEPH LOPRESTI, ANTHONY MOSCATIELLO, OSCAR ANSOURIAN, ANTHONY GURINO and CESAR GURINO,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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On The Petition

QUESTIONS PRESENTED

1. Whether the trial court's dismissal of three jurors without taking any steps to cure the problems that led to their dismissal falls within the manifest necessity exception to the Double Jeopardy Clause?

2. Whether the trial court's declaration of a mistrial upon the mere finding of a "distinct possibility" of jury tampering barred, on Double Jeopardy grounds, retrial of petitioners?

LIST OF PARTIES

Apart from petitioners, one other indicted party, Michael Coiro, was severed, pursuant to Fed. R. Crim. P. 14, prior to trial.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ANGELO RUGGIERO, GENE GOTTI, JOHN CARNEGLIA, EDWARD LINO, MARK REITER, JOSEPH LoPRESTI, ANTHONY MOSCATIELLO, OSCAR ANSOURIAN, ANTHONY GURINO and CESAR GURINO,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Angelo Ruggiero, Gene Gotti, John Carneglia, Edward Lino, Mark Reiter, Joseph LoPresti, Anthony

Moscatiello, Oscar Ansourian, Anthony Gurino and Cesar Gurino, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on April 26, 1988, affirming the denial of petitioners' double jeopardy motion.

OPINIONS BELOW

The opinion of the Court of Appeals is reprinted in the Appendix at pages 1a-63a. The order of the Court of Appeals denying petitioners' petition for rehearing appears in the Appendix at pages 64a-65a. The opinion of the United States District Court for the Eastern District of New York (Costantino, D.J.) ordering a mistrial, appears in the Appendix at pages 66a-87a. The opinion of the United States District Court for

the Eastern District of New York (McLaughlin, D.J.), denying defendants' motion to dismiss the indictment, appears in the Appendix at pages 88a-143a.

JURISDICTION

The Judgment of the Court of Appeals for the Second Circuit was entered on April 26, 1988. A timely petition for rehearing was denied on June 1, 1988. The Honorable Thurgood Marshall of this Court has granted petitioners an extension of time, until August 30, 1988, to file this petition. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Abney v. United States, 431 U.S. 651 (1977).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment of the United States Constitution:

> No person shall be ... subject for the same offence to be twice put in jeopardy of life or limb.

STATEMENT OF THE CASE

This narcotics and obstruction of justice case began in April of 1987, with the selection of an anonymous jury before the Honorable Mark A. Costantino. Trial commenced on June 1, 1987. On October 22, 1987, the government, unbeknownst to the judge and the defense, obtained the names and addresses of the jurors and initiated a grand jury investigation of "information" that "the defendants" had tampered with the jury. (Affidavit of FBI Agent John Flanagan, A 47)[1].

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[1] Numbers in parenthesis preceded by "A" refer to the Joint Appendix submitted to the Court of Appeals; while those preceded by "Tr." refer to the trial transcript.

A. The First Voir Dire

On January 8, 1988, the government made an ex parte application before Judge Costantino to individually voir dire the jury, in camera. This request was based on the Flanagan affidavit (A 47-71), an affidavit of FBI Agent Martin Towey (A 72-75) and a memorandum of law (A 76-101). Three days later, Judge Costantino, without notice to defense counsel, granted the motion and conducted an in camera, ex parte voir dire. (See Tr. of 1/11/88, A 102-137) The sitting jurors unanimously and unequivocally denied any actual or attempted contact. (Tr. of 1/11/88 at 10-36, A 111-137)

On January 12, 1988, defense counsel were finally informed of the government's application and the resulting voir dire, and provided a transcript of the in camera proceeding, along with the

government's memorandum and the Flanagan and Towey affidavits. (A 138) Over defense objection, Judge Costantino granted the government's motion for a hearing on what he called the defendants' efforts to tamper with the jury. The defense also objected to the ex parte nature of the government's motion and the secret voir dire. (Tr. 10179-10189)

B. The Hearing

Three days of public hearings were conducted into the government's allegations of jury tampering.[2] What follows is a summary of the evidence produced.

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[2] Both the government and defense counsel requested that the courtroom be closed. (Tr. 10158, A 144) The Court denied that request. (Tr. 10178)

1. Gary Barnes

Former juror number 2, Gary Barnes, was the government's first witness. Barnes testified that, after being excused as a juror because it was learned he was not an American citizen, he received a telephone call at work from Mel Rosenberg, a fellow employee. Rosenberg asked to speak to him in person. (Tr. 10237-10243) Since REFCO, the brokerage house for which they worked, recorded all employee calls, a tape of that conversation (Government Hearing Exhibit 2) was available and played for the Court. (Tr. 10243)[3] Thereafter, Barnes met with Rosenberg in a REFCO conference room.

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[3] The transcript of that conversation (Government Hearing Exhibit 2A) is in the Joint Appendix. (See A 162-164)

According to Barnes, Rosenberg asked if he was on the "case in Queens"; Barnes replied he was on a case in Brooklyn, not Queens. Rosenberg insisted that the case in Queens had been going on for some time and that he wanted to know how the jury was feeling about it. He mentioned the initials "GG" and then the name Gene Gotti. Although Barnes kept asserting that he did not know what Rosenberg was talking about, Rosenberg said there could be a new BMW for him. Barnes remained steadfast and denied being a juror in that case. (Tr. 10246-10255)

Barnes also testified to a chance encounter during his jury service with a private investigator named William Sewell. Barnes had seen Sewell, a black man, in the spectator section of the courtroom "more than once", and "thought" he had seen Sewell on one occasion

speaking to a defense lawyer in the rear of the courtroom. From this, he concluded that Sewell was a chauffeur. (Tr. 10222-10227, 10289)

One day in approximately July of 1987, Barnes was to be driven home by a fellow juror. After court, they went to a municipal parking lot, where Barnes saw Sewell. (Tr. 10227)[4]

> I was walking in the parking lot with a fellow juror. He came by. I asked him, "Are you a chauffeur?" I go, "What are you, chauffeur?" He didn't hear me. I said "Never mind." He said "I'm a private investigator." (Tr. 10227-10228)

Sewell appeared to be offended by Barnes' question and just "kept going" to his car, which was parked on an upper level. (Tr. 10230) Sewell never approached

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[4] Curiously, this juror who supposedly had accompanied Barnes was left out of the picture painted by the government.

Barnes, nor did he try to talk about the case. (Tr. 10292)

2. Agent John Flanagan

Special Agent John Flanagan of the FBI testified about his December 22, 1987 interview of Mel Rosenberg. At first, Rosenberg denied knowing Gene Gotti. Flanagan then asked Rosenberg if he had ever expressed an interest in Gene Gotti's trial. Rosenberg said he knew what Flanagan was "getting at" and essentially repeated Barnes' version of the events, but called it "a lark." (Tr. 10304-10310) He denied knowing any of the attorneys about whom Flanagan had asked. (Tr. 10311-10312)

Flanagan also testified to serving William Sewell with a grand jury subpoena on November 10, 1987; Sewell's attorney was Charles Carnesi. (Tr. 10312-10313) Over defense objection, Flanagan was

asked to read selected portions of Sewell's grand jury testimony.[5] In these portions, Sewell stated he had spoken to Angelo Ruggiero about the subpoena. (Tr. 10325-10330)

Flanagan also identified and played for the Court additional recordings of Mel Rosenberg's December 22, 1987 telephone conversations at REFCO.[6] First, Rosenberg called "Anthony LNU" in an attempt to obtain a phone number. (A 165-166) Later that day, he called someone identified only as "Big A" and

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[5] The defense requested, but was denied, access to a complete transcript of Sewell's grand jury testimony. (Tr. 10323-10324). A redacted version of that testimony (A 176-255) was provided after the hearing.

[6] Transcripts of those conversations were submitted as Government Hearing Exhibits 12A and 13A. (See A 165-175)

arranged to meet him. Then, Rosenberg called an unknown female at attorney Brian Levinson's office, and asked if Charlie Carnesi had called. Rosenberg also spoke to Carnesi, who told him that he had not gotten in touch with Levinson. Finally, Levinson called Rosenberg to arrange a meeting.

At the end of Flanagan's testimony, a photograph of the house of juror no. 4, located in the immediate vicinity of the houses of two individuals claimed by the government to be organized crime members, was stipulated into evidence, under seal to avoid publicity. (Tr. 10364-10366)

3. **Agent Martin Towey**

The government's last witness, FBI Agent Martin Towey, added nothing to the hearing. Instead, over defense objections to the triple hearsay nature of his testimony, he merely affirmed the

statements made in his January 7, 1988 affidavit in support of the government's motion to voir dire the jury. That affidavit had alleged that, according to a confidential informant known to Special Agent Robert Liberatore, "the defendants" had obtained the license plate numbers of five jurors and that at least one black juror had been compromised. (Tr. 10378-10380) On cross-examination, Towey admitted that he had no first-hand knowledge of this information, but had learned of it from Liberatore. Liberatore, in turn, supposedly had gotten the information from a confidential informant unknown to Towey. Although Liberatore was present in the courthouse that day and available to testify, the government did not call him to testify. (Tr. 10383-10384)

C. Sequestration

Although the investigation into allegations of tampering had been ongoing since October 22, 1987, and had been brought to the attention of the trial judge on January 8, 1988, the jury remained unsequestered until January 14, 1988 (Tr. 10360-10362), and the parties were kept in the dark about its status. Thus, when confronted, on January 13th, by frustrated defense counsel who insisted that "we are entitled to at least know [whether the jury was sequestered]" (Tr. 10179), Judge Costantino responded:

> The jury itself has not been sequestered but conditions were established by the Court with the stenographer in the jury room. They were again instructed not to view any television, listen to any radio or read any newspapers when it becomes apparent that the articles or the viewing of those matters might somehow be related to the issue before the Court.

> As the Court has done in the past, the Court accepted their acknowledgement that they would under such circumstances not in any way listen or view anything that might itself be referable to this proceeding. (Tr. 10179)

The next day, Judge Costantino, without notice to counsel, told an unhappy jury it would be sequestered. (Tr. 10360-10362)

D. The Second Voir Dire

On January 15, 1988, Judge Costantino announced his intention to voir dire the jury a second time. (Tr. 10397) Despite defense requests that this examination be conducted in chambers, the judge, with flagrant disregard for the obvious consequences, voir dired the jury in a courtroom packed with newspaper and television reporters, sketch artists and the public. The jurors were confronted not only with such an imposing gallery,

but with no lesser personages than the United States Attorney himself and his chief assistant, along with another assistant and two FBI Agents. Notably absent from this array of people at the prosecution table were the attorneys who had represented the government for the previous nine months.

Fearful of the intimidating effect which this display of government brass and media interest was bound to have on the jury, defense counsel sought to have the second voir dire, like the first, conducted in chambers. Judge Costantino's only response was that he would "guarantee they won't be scared." (Tr. 10400) When defense counsel pressed this point (Tr. 10431-10435, A 256-260), the judge insisted that he was, "doing it [his] way." (Tr. 10435, A 260)

THE COURT: I can't do that.

> No, it is too far into this case for that business. I am not going to be the victim nor will I be the victim or be the one attacked in a trial ever in my life, and I will not do it. Everything I do is open and aboveboard. It is going to be open and aboveboard. I don't care who is involved. I say this for the record. I don't care who is involved because I don't like what innuendos [sic] they say of Mark Costantino. I think it is disgraceful what they say, and I don't want it and I won't let it happen to me. I don't care what you do with those guys down there. I don't care if the whole bunch of them drop dead right now, but they are not going to-- you couldn't convince me in a million years.
>
> MR. HOFFMAN: I have one other point.
>
> THE COURT: You can protect them all you want but you are not going to do it through me. (Tr. 10399; emphasis added)

Thus, based on a wholly irrelevant fear for his reputation, combined with profound disregard for the fate of the defendants and their rights, Judge Costantino conducted the second voir dire

in open court, birthing a mistrial in the process.

Prior to the second voir dire, the court notified counsel that jurors no. 4 and 11 had expressed "concern" about their ability to serve. Before hearing argument from the defense, Judge Costantino declared that these jurors would be excused. (Tr. 10395) In addition, the government asserted that another juror (not four or eleven) had been compromised, but refused to divulge that juror's number. (Tr. 10399-10401)

The defendants refused to acquiesce to the government's demand that it either object or consent to the removal of jurors no. 4 and 11. Instead, they insisted on receiving further information about the possibly compromised juror before taking a position. Absent such information, they argued, the government

would have a "pocket veto" over the continuation of the trial, since, if the Court excused jurors four and eleven, only twelve jurors would remain with the fate of this other unspecified juror yet to be decided. Again, they emphasized that they did not want a mistrial. (Tr. 10403-10404)

After conferring, the defense proposed that the government reveal, in camera, the number of the juror allegedly compromised, along with the basis for its belief. Counsel added that, if the government was concerned about the dissemination of this information, they would agree not to tell the defendants and that all defendants would waive their right to such information. (Tr. 10411-10412) Reluctantly, the government agreed to provide to the court and counsel under seal both the juror's

number and "the basis of why we are saying it." (Tr. 10414) In camera, however, it provided the juror's number, but refused to state the facts underlying its claim. (Tr. 10420) Incredibly, the prosecutor stated he had received the information about the allegedly compromised juror from the FBI just 40 minutes prior to revealing the juror's number. (Tr. 10419-10421)[7]

Over defense objection (Tr. 10427-10430), Judge Costantino proceeded with

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[7] It should be noted in this regard that the January 7th Towey affidavit stated that at least one of the black jurors had been compromised and that the FBI knew of this "long before the approach of former juror no. 2..." (A 74) Since the government admitted that it was aware of only one compromised juror, whose number it revealed in camera on January 15th, and who is black, the Towey affidavit, if true, necessarily refers to this juror and demonstrates that the information was available "long before" the government came to Judge Costantino in January.

the second voir dire in open court.[8] (A 256-300) All jurors repeated that no one had approached them or attempted to compromise them in any manner. (Tr. 10438-10471, A 263-296)

The second voir dire also included questions about publicity. Juror no. 4 told of coming home after the first day of hearings (about which he was supposed to be ignorant) and being confronted by his father about media accounts. In this regard, all juror no. 4 stated was that "at this point [he didn't] know whether [he] c[ould] be impartial." (Tr. 10445, A 270) Juror no. 7 told the Court that the jurors were "wondering" what was going

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[8] When the jurors were brought into open court, at least two expressed a desire to have the proceedings in chambers. (Tr. 10438, A 263) The court expressed an initial willingness to proceed in chambers, but then changed its mind. (Tr. 10439, A 264)

on, but that she could continue to be fair and impartial. (Tr. 10449-10450, A 274-275) Juror no. 10 also referred to the jury's speculation about what was going on, but said it would not affect his ability to continue. (Tr. 10457-10458, A 282-283)

Juror no. 11 likewise said that the jury was "wondering" what was going on (Tr. 10459-10460, A 284-285) and told the court (as she had previously in chambers) that someone she knew had found out what case she was on, making her feel "uneasy." (Tr. 10460, A 285) That, however, did not impair her ability to be fair and impartial and would not affect her judgment. (Tr. 10461, A 286) This juror was re-voir dired by the court, and reiterated that she could be fair and impartial. (Tr. 10469-10470, A 295-296) Finally, Juror no. 12 stated that she had

guessed what the proceedings were about and, consequently, it would be difficult for her to be fair and impartial. (Tr. 10462-10463, A 287-288) In a further voir dire requested by the defense, she said she had "put pieces together" and accordingly, it would be "very, very hard" for her to be fair. (Tr. 10470-10471, A 296-297)

The surprise of the second voir dire was juror no. 8, long recognized by both the court and counsel as an extremely intelligent and attentive juror. (Tr. 8812-8814) After referring to a "general undercurrent" among the jurors as to what was taking place (Tr. 10450, A 275), and mentioning a brief exposure to possible television publicity (which would not impair his judgment), this juror announced his surprise (after nine months of trial) that he was sitting on a

narcotics case.[9] Given personal experience with members of his family and drugs, he claimed could not be fair and impartial. (Tr. 10452-10453, A 277-278)

E. The Proceedings Following the Second Voir Dire

Since Judge Costantino had determined to excuse jurors 4 and 11 (but had not yet actually discharged them), the loss of any additional juror would force a mistrial because less than twelve would be left.[10] In an effort to save the

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[9] In this regard, it should be noted that the prosecutor began his opening by stating: "This case, ladies and gentlemen, is about drug trafficking." (Tr. 843) The government's case began with evidence of a seizure of two kilograms of heroin. The heroin was marked in evidence and displayed to the jury.

[10] It should be noted that the defense had unsuccessfully pressed Judge Costantino to seat six, rather than just four, alternates.

trial, the defense asked Judge Costantino to resolve by curative instructions the unease of the jurors who had expressed doubt about their continued ability to serve. For example, if the jurors who had merely expressed doubts about their ability to be fair were to be told about the cost of a re-trial to all parties, etc., any doubts or biases might be diffused, thus ensuring their continued service.[11] The defense request was denied, with Judge Costantino maintaining that he could not cure "anything", including his own "sore leg." (Tr. 10471-10472, A 297-298)

Court adjourned until January 19th to give the government an opportunity to

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[11] Indeed, Juror No. 11, who had earlier expressed reservations about being fair, changed her attitude by the second voir dire and did not have to be excused.

file motion papers. (Tr. 10472, A 298) The defense response was due on January 21, 1988. (Id.) During the afternoon of January 19, 1988, while awaiting receipt of the government's papers, defense counsel were notified that a special en banc panel of the Judges of the Eastern District had been scheduled for January 21, 1988 and that the defendants' responsive papers (see A 301-354) were to be filed with the panel by that date. No other information was provided.

On January 21, 1988 the en banc panel met. The government and defense counsel presented their respective positions. With the defense still steadfast in its desire to proceed with the trial, the government asked for a mistrial.

The following day, Chief Judge Weinstein, writing for the special panel, found, inter alia: that the grand jury

investigation into jury tampering was bona fide; that there had been "good reason" for the government to bring to the trial judge's attention "the possibility" of jury tampering; that any publicity was not the fault of the government; and that these three findings were made "on the record now before us without prejudice to any contrary findings on the basis of any evidence, hearings and argument which may be advanced" in the future. (See A 362-363; emphasis supplied)

On January 25, 1988 Judge Costantino found "manifest necessity" to declare a mistrial. (See A 67a-88a) After reading his opinion in open court, he brought in the jury, excused jurors 4, 8 and 12 and declared the mistrial. (Tr. 10523-10525)

The matter was thereafter re-assigned to the Hon. Joseph M. McLaughlin, who,

after hearing from the government and defense, severed the case into four segments. The first segment, involving only the defendants Ruggiero, Carneglia and Gotti, ended in a jury deadlocking.

Shortly after the reassignment, the government sought to have the defendant Gotti's bail revoked based upon its allegations of jury tampering. Finding that the record before Judge Costantino "ha[d] been pretty much trashed" because the government had "back[ed] off from a lot of things," Judge McLaughlin ruled there was insufficient evidence to believe that defendant Gotti had committed a crime while on bail and, denied the remand motion. (Tr. of 2/8/88 at 52-58, A 428-434) Indeed, one of the significant allegations from which the government "backed off" during the bail hearing was the claim that a sitting

juror had been compromised. (Tr. of 2/8/88 at 42, A 418) (See also discussion at pp. 47-48, infra.) In any event, petitioners' motion to dismiss the indictment on double jeopardy grounds was denied. (89a-143a)

THE COURT OF APPEALS DECISION

In affirming the denial of petitioners' double jeopardy motion, the Court of Appeals made two related findings. First, the Court held that Judge Costantino's dismissal of three jurors, leaving only eleven, created a "manifest necessity" for a mistrial. (29a-33a) Second, the Court reaffirmed and expanded its holding in United States v. Mastrangelo, 662 F.2d 946 (2d Cir.), cert. denied, 456 U.S. 973 (1982),[12]

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[12] We refer to two Mastrangelo opinions in this petition: United States

(continued...)

concluding that the Double Jeopardy Clause is not offended by a mistrial based upon the District Court's finding of a "distinct possibility" that the defendants were involved in jury tampering. (25a-29a)

In a strongly worded dissent, Judge Lumbard noted that "[h]owever heinous the crimes for which the defendants stand accused, and however dispicable their reputations, they are no less entitled to the protections of the Constitution afforded by the prohibition against double jeopardy." 63a. In essence, Judge

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[12](...continued)
v. Mastrangelo, 662 F.2d 946 (2d Cir.), cert. denied, 456 U.S. 973 (1982), and United States v. Mastrangelo, 693 F.2d 269 (2d Cir. 1982), cert. denied, 467 U.S. 124 (1984). The second opinion, cited infra at 43, was an appeal after remand. When we refer to Mastrangelo, we are referring to the first case unless otherwise stated.

Lumbard concluded that Judge Costantino never determined that the jurors were incapable of rendering a verdict based solely upon the evidence presented in the case.

REASONS FOR GRANTING THE WRIT

I

THERE WAS NO MANIFEST NECESSITY REQUIRING A MISTRIAL

Quite simply, a mistrial here was unnecessary, or at least premature, because the trial court did not have sufficient grounds for dismissing the three jurors. In making this claim, we rely upon Judge Lumbard's eloquent dissent:

> A mistrial was declared on January 22, 1988, after more than eight months of a trial which began with the selection of the jurors in April 1987 and the presentation of evidence by the government commencing June 1. In light of the length of the

government's case and the serious nature of the charges against these defendants, it was the paramount duty of the district court to keep the trial going until the jury brought in a verdict. Without a determination by the court that the jurors were incapable of rendering a verdict based solely upon the evidence presented in the case, the trial should have continued until the jurors either reached a verdict or reported a hopeless failure to agree. The district court made no such determination.

The evidence presented to the court concerning the approach of dismissed juror Gary Barnes, and the attempts to identify the remaining jurors, certainly required the immediate attention of the court. Although the in camera ex parte examination of the remaining jurors (at which none of the counsel were present) by Judge Costantino disclosed that contact with the jury had occurred, it did however lead the court to believe that some jurors were uneasy. Up to this time, the jurors had not been sequestered.

Judge Costantino next proceeded to conduct an examination of the jurors in open court with the defendants, counsel and the public present. In my view, the record shows no

good reason for this decision. The open court examinations led the court to dismiss three jurors, numbers 4, 8 and 12, without any showing that as a result of any improper activity by the defendants, they could no longer render a verdict on the evidence in the case.

The testimony of those three jurors fell far short of providing a basis for disqualifying any of them. Juror number 4 told the court in camera that he was not sure that he could continue to serve because his father had mentioned to him that there had been some allegations of jury tampering. Later, in open court, he said he still felt the same way and "did not know whether [he could] be impartial."

Juror number 8 disclosed that his wife had heard something on the radio about jury tampering and a mob trial. In answer to the court's question concerning whether in his judgment he had been impaired, he replied that "his judgment had not been impaired." However, he then volunteered that as the trial progressed, and the issue of drugs became central to the case, that he could not be fair and impartial because of immediate family members' involvement with drugs.

Juror number 12, who denied being contacted about the case, said that he had an idea "of what this is all about and it is kind of changing my input as to whether I can be impartial or not." The questioning ended with him saying that "because of recent events and not because of the trial and evidence that has been submitted" he would find it difficult to be impartial.

In my view, it does not appear from the record that any one of the three jurors could not have decided the case based on the evidence at trial. That is the ultimate test of the "manifest necessity" for a mistrial. Arizona v. Washington, 434 U.S. 497, 505-06 (1978). By the time they began their deliberations the jurors would have been reminded of their duty to decide the case based solely on the evidence presented many times during the proceedings--first by the judge during jury selection, then by both counsel in the summations, and again by the judge in his charge. Why were those three jurors not reminded of this duty before they were dismissed? Before taking the extraordinary step of declaring a mistrial, it was the duty of the court to urge the jurors to serve and consider the case solely on the evidence.

The examination of the jurors in open court in view of all that had taken place during the preceding three days could only have resulted in making them more uneasy about what was going on. Jury service in such a long trial is at best a strain and entails many personal sacrifices and is compensated largely by the fulfillment of an important civic duty. With few exceptions, those called for jury duty respond to the challenge. They accept the instructions of the judge. Countless times in our opinions, we have reaffirmed our belief that jurors can be relied upon to follow the instructions of the court. Richardson v. Marsh, 107 S.Ct. 1702, 1707 (1987); United States v. Teitler, 802 F.2d 606, 617 (2d Cir. 1986). In addition, any conceivable prejudice that may have been caused by the jury hearing about the alleged jury tampering from the media could have been cured by a specific jury instruction. United States v. Feldman, 299 F.2d 914, 917 (2d Cir. 1962).

Here we have not a shred of evidence that any one of these three jurors could not have laid aside their apprehensions and rendered their verdict on the evidence. The judge never asked them to do that and never inquired about whether they could

do so. On the contrary, in the setting in which the voir dire occurred, it surely must have seemed to all three of these obviously uneasy jurors that they were being offered a way out of continuing the service which had become onerous and the continuance of which may have had unpredictable consequences.

Even assuming that dismissing the three jurors was proper, the record fails to show that the court took every reasonable step to continue the trial with a lesser number than 12. Indeed, before the court made its decision to dismiss the jury, it should have inquired of the defendants whether they would agree to be tried by a jury of less than 12. Neither the court nor the government inquired of the defendants or suggested such an inquiry. Although it is doubtful whether the defendants would have agreed, at the very least, the court should have made every attempt before deciding to dismiss all three of the jurors. Keeping any one of the three jurors would have saved the jury and allowed the trial to continue.

The question was not whether any juror was still "impartial"-- whatever that ambiguous term might mean to the jurors. The question was whether there were

enough jurors that could decide the case on the evidence. At the point a mistrial was declared, only the government's case had been presented to the jury. Thus, it seems more than likely that, at that point, before any defendants' evidence and before summations of counsel, many of the jurors would have formed some opinion. Even without rumors of jury tampering, they may have quite naturally no longer been "impartial."

There was no showing that any remaining member of the jury had been tainted or even approached. There was no showing that as a result of the inquiry by the court that any member of the jury could not have rendered a verdict on the evidence in the case. This, combined with the judge's remarks about his displeasure regarding the trial, the mishandling of the voir dire, and his failure to take reasonable measures to retain a jury which could have reached a verdict, leads me to conclude that there was no showing of "manifest necessity" to justify the declaration of a mistrial.

(54a-63a)

II

THE "DISTINCT POSSIBILITY" TEST EMPLOYED BY THE SECOND CIRCUIT EVISCERATES THE PROTECTIONS OF THE DOUBLE JEOPARDY CLAUSE

As Judge McLaughlin correctly observed,

> The double jeopardy clause of the fifth amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." Once jeopardy attaches, a defendant possesses a "valued right to have his trial completed by a particular tribunal." Wade v. Hunter, 336 U.S. 684, 689 (1949).

(110a; emphasis supplied) See also Oregon v. Kennedy, 456 U.S. 667, 672 (1982); Arizona v. Washington, 434 U.S. 497, 503 (1977).

> The reasons why this "valued right" merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden of the accused, prolongs the period in which he is stigmatized by an unresolved accusation of

> wrongdoing, and may even enhance the risk that an innocent defendant may be convicted.

Arizona v. Washington, supra, 434 U.S. at 503-504.

Applying the evidentiary standard of United States v. Mastrangelo, supra, 662 F.2d at 952 -- i.e., the "distinct possibility" of a defendant's complicity -- Judge Costantino found that a mistrial should be granted because there was a "very high degree of likelihood that the [jury] panel sitting on this case has to some extent been compromised as a result of unlawful conduct circumstantially attributable to the defendants." (73a) Stripped to its essentials, this holding is nothing more than the bootstrapping of innuendo upon suspicion, and means only that there might be some chance that an unspecified juror or jurors, who at some point constituted part of the panel in

this case, might have in some way been affected by illegal conduct tangentially, but not necessarily causally, related to an unspecified defendant or defendants. Such far-fetched conjecture cannot withstand close scrutiny.

The Second Circuit affirmed this finding, holding that the Mastrangelo test applies whenever it is necessary "to avoid a mini-trial which could last weeks or months and maximize the risk of alerting the jury to allegations of misconduct." (27a)

Petitioners respectfully submit that the Mastrangelo test should not have been employed, both because the holding of that case is limited to its very peculiar facts and because, if it were to become the norm, the "manifest necessity" standard would be eviscerated.

1. Mastrangelo Is Not a Case of General Application and Is Substantially Limited to Its Own Facts.

At the outset, it must be noted that both the defendants and the government took the position that the government had to prove tampering by a fair preponderance of the evidence before "manifest necessity" could be found. This was not surprising, since the majority opinion in Mastrangelo concluded that the "distinct possibility" standard was appropriately used in that case because, in effect, there was no viable alternative. Through no fault of the government in that case, crucial evidence it needed to make its case against the defendant had been made unavailable. The government's chief witness, indeed its only witness, against Mastrangelo had been murdered hours before his scheduled

court appearance. The only question that remained was whether Mastrangelo had participated, directly or indirectly, in the murder of that witness.[13] In this regard, the Court reasoned that

> [i]t would ordinarily be impossible to make an investigation, have a hearing, and permit the introduction of evidence and cross-examination, with some resultant finding based upon whatever standard of proof might be appropriate, see e.g., Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed. 2d 618 (1972) (upholding the use of the preponderance-of-evidence standard as the burden of proof in a suppression hearing re the voluntariness of a confession), meanwhile suspending the trial in question. It is simply impossible in the situation of the killing of a key witness to reach any well founded determination about the true

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[13] Significantly, a mistrial was granted only as to Mastrangelo since there was no claim that his co-defendant had any involvement in the murder of the witness. United States v. Mastrangelo, supra, 662 F.2d at 952.

> course of events in an hour, a day, a week or even a month.

United States v. Mastrangelo, supra, 662 F.2d at 951.

The Mastrangelo Court then approved the "distinct possibility" rule because it recognized that, to make a determination under some greater evidentiary standard, would cause a delay in the trial that in and of itself would warrant a mistrial. Id. at 951-952 ("... the jurors' minds would no longer be fresh and, even worse, the reasons for the delay might have become evident to one or more of them."). In other words, as the post-remand panel noted, the Mastrangelo majority found an imperative need to apply the "distinct possibility" standard. United States v. Mastrangelo, 693 F.2d 269, 272 (2d Cir. 1982), cert. denied, 467 U.S. 1204 (1984).

No such imperative need existed in this case. That, of course, is what even the government implicitly recognized when it asked Judge Costantino to apply the preponderance of evidence standard. Simply put, Mastrangelo should not be viewed as a case of general application. While its application may not require the actual murder of a government witness, there must be similarly exigent circumstances. Yet, if there were ever a trial where exigency played no role, this is that case. Indeed, repeated requests for severance by various defendants, predicated on the same concern for freshness of the evidence expressed by the Mastrangelo Court, were opposed by the government and denied by Judge

Costantino.[14] Moreover, through no fault of the defendants, the government's estimate of a two to three month trial was allowed to become a reality of a nine month case-in-chief, which generated 10,000 transcript pages. Given these circumstances, it would be ludicrous to suggest that the trial could have been jeopardized by a "well founded determination about the true course of events."

Moreover, unlike Mastrangelo, this was not a sudden event which shocked everyone and required immediate emergency action. See United States v. Mastrangelo, supra, 662 F.2d at 951 (Judge Weinstein observed, "everybody in this courtroom was shocked. [Defense

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[14] In contrast, Judge McLaughlin severed the case into four components.

counsel] was very upset."). Allegations of jury tampering first surfaced in October. While the government could surely not investigate a murder in a matter of minutes, hours or days, it could, and did, investigate these tampering allegations over several months, employing all of its investigative resources, including a grand jury. Indeed, two and a half months of investigation preceded the initial application to the District Court, and two more weeks followed before the mistrial was ultimately granted. Plainly stated, there was no exigency similar to that present in Mastrangelo.

Moreover, it must be emphasized that, in Mastrangelo, there was no question about whether James Bennett had been murdered. The factual determination to be made there was whether there was a

"distinct possibility" that Mastrangelo played a part in this spoliation of evidence. In the instant case, the threshold inquiry was whether the jury then hearing the case had actually been compromised. Mastrangelo does not stand for the proposition that the ultimate fact threatening the trial may be established by a "distinct possibility." Rather, it simply holds that once the threatening act -- the unavailability of the evidence -- is established, the determination, under those exigent circumstances, of whether a defendant played a part in it, may be made by applying the "distinct possibility" standard.

Since the government never proved (and, at the subsequent Gotti bail hearing, withdrew the allegation) that any sitting juror had actually been

compromised, the "distinct possibility" test should not have come into play. The naked claim that it was the petitioners who benefitted from a compromised juror or jury could not carry the government's burden where the very essence of the defense position was that they were winning the case on the evidence and, thus, wanted to explore any alternative to a mistrial.[15] In other words, jury tampering would have caused a mistrial, the very result which the petitioners vigorously sought to avoid.

2. Application of the Mastrangelo Standard Would Eviscerate the Manifest Necessity Requirement

United States v. Mastrangelo, supra, represents, as the majority of that Court found by necessity, a departure from the

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[15] Significantly, the retrial of defendants Gotti, Ruggiero and Carneglia ended with a jury deadlock.

"heavy burden" of proof recognized in Arizona v. Washington, supra, 434 U.S. at 505-506. Mastrangelo's unusual relaxation of constitutional safeguards should not become, as it would if used in this case, a matter of general application.

> It is axiomatic that the doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings.

United States v. Jorn, 400 U.S. 470, 485 (1971). Consequently, "the trial judge must 'take care to assure himself that the situation warrants action on his part foreclosing the defendant from a potentially favorable judgement,'" United States v. Tinney, 473 F.2d 1085, 1088-1089 (3d Cir.), cert. denied, 412 U.S.

928 (1973) (quoting United States v. Jorn, supra, 400 U.S. at 486), while remaining especially "[m]indful of the Supreme Court's admonition that any doubt should be resolved in favor of the liberty of the individual in order to prevent the exercise of 'an unlimited, uncertain, and arbitrary judicial discretion.'" Id. (quoting United States v. Downum, 372 U.S. 734, 738 (1963)) (emphasis supplied).

Thus, courts have long commanded that the government be held to a "heavy" burden of demonstrating a "high degree" of necessity. Arizona v. Washington, supra, 434 U.S. at 505-506. The basis of this command is apparent from the very words "manifest necessity." Thus, while "necessity" is itself a strong word, meaning "great or imperative need," WEBSTER'S NEW UNIVERSAL UNABRIDGED

DICTIONARY at 1200 (2d ed. 1979), courts have made it even stronger by modifying it with the term "manifest," which means "evident, clear, plain." Id. at 1094.

Although a judge is commanded to refrain from granting a mistrial unless he is "assured" through "scrupulous" factfinding that the government has met its "heavy" burden of establishing an evidently imperative need and that an "uncertain" or "arbitrary" decision is not being made, the Mastrangelo Court held that a mistrial could be granted if there was a "distinct possibility" of misconduct by the defendant. As Judge Meskill noted in his Mastrangelo dissent, these commands simply cannot be harmonized.

> The majority, in permitting the protections of the Fifth Amendment to be defeated by a reasonable conclusion that there is a "distinct possibility" that the

> defendant was somehow connected with the disappearance of government evidence, ignores the "heavy burden" and "high degree" standards enunciated in Arizona. The crux of the majority opinion is that it would be "impracticable in the situation of the killing of a key witness to reach any well-founded determination about the true course of events .... " It may well be impracticable to make such a determination, but I cannot accept the conclusion in this case that impracticability justifies relieving the government of its "heavy burden" to show that the denial of an important constitutional protection is highly necessary.

United States v. Mastrangelo, supra, 662 F.2d at 953-954 (Meskill, J., dissenting).

The plain language of the Mastrangelo standard demonstrates its incongruity and supports Judge Meskill's conclusion. Simply stated, "distinct" means "clear" or "plain", WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY, supra, at 534, while "possible" means "capable of

existing". Id. at 1406. Thus, under the Mastrangelo standard, a defendant could have his constitutional protection against being twice put in jeopardy forfeited if a given circumstance is "clearly capable of existing", without any regard for whether it actually exists. Since almost anything is "clearly capable of existing," Mastrangelo is, in effect, standardless because it furnishes the trial court no meaningful guidance.

Unless this Court is prepared to devalue the "valued right" to be free from double jeopardy, Arizona v. Washington, supra, 434 U.S. at 503, the Mastrangelo standard cannot become the norm. The Mastrangelo standard allows a defendant to be reprosecuted -- and, thus, face all the attendant increased emotional and financial burdens, Arizona

v. Washington, supra, 434 U.S. at 503-504 -- "upon [a lesser] degree of proof than applies in a negligence case." Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 285 n. 18 (1966).[16] This makes no sense in the context of a constitutional right deemed to be fundamental.

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[16] Indeed, even in certain civil cases, e.g., those alleging fraud, adultery, illegitimacy, lost wills or certain oral contracts, the higher standard of "clear and convincing evidence" has been applied. Woodby v. Immigration and Naturalization Service, supra, 385 U.S. at 285 n. 18.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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